

Before the
Commission on Common Ownership Communities
Montgomery County, Maryland

In the matter of

| | | |
|-----------------------------|---|----------------|
| Jo Ann Fiscina | x | |
| c/o Corinne Rosen, Esq. | x | |
| P.O. Box 493 | x | |
| Rockville, MD 20848, | x | |
| Complainant, | x | |
| | x | |
| v. | x | Case No. 71-06 |
| | x | May 21, 2008 |
| Devonshire East Homeowners | x | |
| Association | x | |
| c/o Jeffrey Van Grack, Esq. | x | |
| Lerch, Early & Brewer | x | |
| Suite 460 | x | |
| 3 Bethesda Metro Center | x | |
| Bethesda, MD 20814, | x | |
| Respondent. | x | |

DECISION AND ORDER

The above-captioned case, having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, pursuant to sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, 1994, as amended, and the Commission, having considered the testimony and evidence of record, finds, determines and orders as follows:

Background

Ms Jo Ann Fiscina (Complainant) filed a complaint with the Commission on Common Ownership Communities on October 18, 2006, alleging that the Board of Directors of Devonshire East Homeowners Association (Respondent or Association) has failed to comply with statutes and the Association documents in relation to holding annual meetings and the election of Directors, the conduct of business and Board and committee meetings, keeping and making records available to Association members, and changing the number of members of the Board.

Response to the complaint was served on November 27, 2006. Many of the allegations in the complaint were catalogued without response, it was argued that the Commission lacked jurisdiction to grant relief as requested on a number of allegations, and the other allegations were denied.

Inasmuch as the matter was not resolved through mediation, the dispute was presented to the Commission on Common Ownership Communities for action pursuant to section 10B-11(e) of the Montgomery County Code on March 7, 2007 and the Commission accepted jurisdiction. A public hearing in this matter was convened on May 30 and continued through August 7, 28, 29, September 17, 24, October 15, 16, November 10, 2007 and March 1, 2008 at which time the record was closed. A closed meeting was held with counsel and parties on June 28, 2007 to discuss conditions surrounding their settlement discussions which they reported ultimately were unsuccessful. A Decision on Respondent's Motions was issued on January 30, 2008.

Findings of Fact

1. The Montgomery County Code at Section 10B-17 has required, since 1990, at subsection (b)(2) that election materials not suggest a preference among candidates and at subsection (d), in *pari materia*, that "a proxy that is not appointed to vote as directed must be appointed only to meet a quorum or vote on matters other than an election for a governing body." Montgomery County Code, 1994, as amended.

2. The undisputed testimony in this case was that the proxy form used by the community had not been changed in many years and purports to grant general authority to the proxy agent to vote on all issues arising at the meeting of members including in the election of members of the board of directors. These proxies have been used to vote for election of Directors for many years and were used for this purpose at the meeting of members held in September 2006.

3. The minutes of the annual meeting held on July 23, 2001, indicate that Stephen Shaffer and Eugene Berman were elected to the Board. (C-6, C-7) Mr. Shaffer did not run again until the meeting held in January 2006 but continued to serve on the Board.

4. The annual meeting announcement and attachments for the meeting scheduled to be held June 13, 2002 and rescheduled for August 28, 2002 include candidate statements from, among others, Frank Weisel, dated June 10 and Stephen Shaffer, dated August 21 or 26. Mr. Shaffer is not listed on the ballot included with the annual meeting announcement package. (C-8)

5. The annual meeting announcement and attachments for the meeting scheduled for May 27, 2004 indicates that there were two Board positions to be filled. Candidacy statements for Eugene Berman and Gail Nachman and a ballot with their names was included. (C-9)

6. The annual meeting package for the meeting scheduled to be held January 18, 2006 indicates that there were two Board positions to be filled and includes candidate statements for Stephen Shaffer, Sandra Setzekorn-Cruz and Michael Pearson and the ballot included includes their names. (C-13) The tally sheet shows the highest number of votes for Sandra Setzekorn-Cruz and Stephen Shaffer. (C-15)

7. The annual meeting package for the meeting scheduled to be held September 28, 2006 does not include any candidate statements but indicates that there was one position on the Board to be filled and that there were two candidate's statements (C-20); statements by Frances Mielach and Frank Weisel were circulated at a later date. (C-21)

8. Ballots in the record that were cast at the meeting held September 28, 2006 totaled 18 votes for Frances Mielach and 12 votes for Frank Weisel. (C-30) Undirected proxies in evidence authorizing a vote for the election of directors were given to the Board of Directors (2), Stephen Shaffer (21), Lori Weisel (2), Eugene Berman (14), Paul Heaps (1), Daryl Flatte (1) and George Temple (4). (C-29) The tally of the vote including those voted by agents carrying proxies is 26 votes for Frances Mielach and 47 votes for Frank Weisel. (C-30)

9. The Association Bylaws at Article III, Section 1, "Annual Meetings", require that the annual meeting of the members be held on the same day of the same month or on such reasonably similar date as may be selected by the Board of Directors.

10. The record includes the following evidence regarding the scheduling and holding of annual meetings over the past several years:

- Annual meeting notice dated April 12, 1999 for meeting to be held May 13, 1999 and a notice dated May 6, 1999 that the annual meeting was postponed but would be held May 25, 1999 (C-4);
- Annual meeting notice for meeting to be held May 16, 2000 (C-5);
- Annual meeting notice for meeting to be held July 23, 2001 (C-6);
- Annual meeting notice for meeting to be held June 13, 2002 (C-7), notice of meeting rescheduled to August 23, 2002 (C-8);
- Annual meeting notice for meeting to be held May 27, 2004 (C-9);
- Annual meeting notice for meeting to be held December 14, 2005 (C-10), notice of rescheduling annual meeting to January 18, 2006 (C-13);
- Annual meeting notice for meeting to be held September 28, 2006 (C-20).

11. The Maryland Homeowners Association Act, at Md. Code Ann., Real Prop. (RP) § 11B-111, provides, notwithstanding anything to the contrary in any of the documents of the homeowners association, subject to limitations set forth below, all meetings of homeowners associations, including meetings of the board of directors or other governing body, or a committee of the homeowners association, shall be open to all members of the homeowners association or their agents and all members of the homeowners association shall be given reasonable notice of all regularly scheduled open

meetings of the homeowners association. The purposes for which a meeting of the board of directors or other governing body or committee of a homeowners association may be held in closed session are for: a) discussion of matters pertaining to employees and personnel; b) protection of the privacy or reputation of individuals in matters not related to the homeowners association's business; c) consultation with legal counsel; d) consultation with staff personnel, consultants, attorneys, or other persons in connection with pending or potential litigation, e) investigative proceedings concerning possible or actual criminal misconduct, f) consideration of the terms or conditions of a business transaction in the negotiation stage if the disclosure could adversely affect the economic interests of the homeowners association, g) compliance with a specific constitutional, statutory, or judicially imposed requirement protecting particular proceedings or matters from public disclosure, or h) on and individually recorded affirmative vote of two-thirds of the board or committee members present, some other exceptional reason so compelling as to override the general public policy in favor of open meetings. If a meeting is held in closed session, the statute further requires that no actions be taken or matters discussed that are not permitted to be handled in closed sessions and that a statement of the time, place, and purpose of the closed meeting, the record of the vote of each board or committee member by which the meeting was closed and the authority for closing the meeting be included in the minutes of the next meeting of the body.

12. The Association Bylaws at Article VI, Section 1, require that “[a]ll meetings of the Board of Directors or any committee created by the Board of Directors shall be held only at regularly scheduled and established dates or periods at such time and place as shall have been made known to all members in accordance with the procedures established in Article III, Section 3, of these Bylaws.¹ All such meetings shall be open to all owners and occupants of units of the Association, their guests and any representative of the news media and be held at places and times convenient to the greatest number of members. Meetings of the Board of Directors may be held in closed session only in accordance with Article III, Section 9,² of the Bylaws.” Article III, Section 9 includes reasons for closing meetings beyond those in the statute, which the statute would not permit.

13. There was extensive testimony about Board meetings over the years for which no notice was given to the community and in some cases notice was not given to all of the members of the Board. Even since January 2006, when, according to testimony from members of the Board, the Board decided that notice of meetings would be provided to the community, meetings were closed without appropriate reasons for closing them and Board actions were taken at meetings for which no notice was given.

14. The Bylaws, at Article IV, Section 1, mandate that starting at the first annual meeting of the Association, the Board of Directors shall be an uneven number of not less than three and not more than seven members. The number of Directors is to be decided by, and may subsequently be changed by, the Association members at a meeting of the

¹ Article III, Section 3, “Notice of Meetings” includes specific requirements for adequate notice of meetings.

² Article III, Section 9, “Open Meetings” requires that all membership meetings be open to all owners and occupants of units in the Association, their guests and representatives of the media, except under enumerated circumstances.

members. The term of the Directors is to be three years unless the Association members at an annual meeting resolve to fix the term of the Directors to be one year.

15. Minutes from meetings of the Board in 1998 and 1999 (C-1, C-2) and a memo from one Director to others indicate that there were seven members of the Board at that time. Testimony of Ahmed Motawie, President of Liberty Management, the management company for the Association for approximately 15 years, was that he has no record of a membership vote to change the number of Directors. There is no other evidence in the record that the Association has conducted such a vote.

16. Article X, Section 10.02, of the Declaration provides that any management agreement entered into by the Association shall provide that the agreement may be terminated without cause by either party on 90 days written notice and that the term of any agreement shall not exceed one year but may be renewable by mutual agreement for successive one-year periods.

17. At the meeting of the Board held on May 18, 2006, the Board passed a resolution to ratify past acts (C-58), which says:

The Board of Directors recognized that the Community has appropriately indicated that on-going activities of the Board and Association committees need to function more effectively and more openly, but has not indicated any desire to thwart on-going activities by unduly dwelling on the past;

WHEREAS, the previous Boards and committees over the last 18 years have approved architectural change requests and other community regulations without, what might be alleged to be, sufficient formal documentation and/or for which formal documentation no longer exists; and

WHEREAS, there is no indication or even any credible allegation that any such past action of any Board member or committee member was taken other than in good faith.

NOW THEREFORE, it is hereby:

That the Board adopts, ratifies and confirms all architectural change or other community regulatory actions taken and things done in good faith by the current or past Directors, officers of this Association and committee members, in the usual course of business to date, including all actions taken by such individuals in good faith and in the reasonable belief that such actions were or would be in the best interests of this Association, including all actions by Directors and committee members at all meetings, whether or not such meetings were properly called or open, and whether or not such actions were otherwise irregular.

18. Ms Fiscina testified that she had not been afforded an opportunity to review many records she had requested prior to the response to her discovery request in this case and even then some records were not provided. Ms Setzecorn-Cruz testified that as a Board member there were a number of financial and some other records that were not made available to her. Other testimony provided evidence that community records were not shared with Association members. The Maryland Homeowners Association Act, at RP § 11B-112, requires that Association records be available to members and others and so do the Devonshire East Bylaws at Article XII.

19. Mr. Motawie testified that he only kept community records for five years.

Discussion

There were many issues raised in this case. As more carefully described in the Findings of Fact section of this Decision, governance practices became inappropriately sloppy. The Association bylaws require that an annual meeting of members be held at the same time each year, but no such meeting date was established. Annual meetings were scheduled on a couple of weeks notice and were postponed. They were scheduled as much as 18 to 22 months apart rather than once a year. The number of Directors simply shrank from seven to five despite the requirement that such changes be by vote of the membership. A proxy form was used that does not comply with the Montgomery County Code. No notice was given to the community of Board and committee meetings in violation of the Association Bylaws and the Maryland Homeowners Association Act. Records, if kept, were not available, including those related to business dealings, financial records, meeting minutes and architectural control actions.

It is clear that there is great disagreement among members of this community. Over the many sessions of public hearing that were held, only three members of the Board were present and five to ten other unit owners attended.

It appears that, in addition to regularizing community governance, one issue that underlies the disagreement is that of architectural control. The current Board is comfortable in approving applications even if the design of the community is slowly mutated by these approvals. The dissenters are interested in maintaining the original design. It is not clear where most of the community stands on this issue. The testimony on architectural decisions was used to demonstrate the failures in the community's governing process. No single architectural application was raised as an issue on its merits. Members of the community had been involved in various activities related to architectural standards which appear not to have been completed or sustained and those who had invested in the effort were frustrated. Testimony indicated that some members of the community had collected and organized information on the original colors and design but that this information was being ignored.

Additionally, some architectural applications were approved by fewer members of the Board than are required for official action or other than at open Board meetings.

Applications for architectural change in accordance with Article V of the Devonshire East Declaration of Covenants, Conditions and Restrictions are deemed approved 60 days after their submission if not denied, so even with the informalities those architectural changes for which there is a record of an application and no denial have been approved. The Board should establish a process whereby architectural applications are considered at meetings for which notice is provided to the community. It may be beneficial to the community to assure that immediate neighbors are aware of applications for changes. This is not currently required.

The Board conducted a community inspection in 2006 and declared it a closed meeting in order to protect the privacy or reputation of homeowners apparently because there might be discussion of architectural violations. Since discussion of compliance with architectural standards involves homeowner association business, it does not fall within an open meetings exception. Additionally, these are matters that should be freely discussed within the community so that homeowners understand how their neighbors feel about the architectural design of the community. This kind of meeting may permissibly be unannounced, permitting the Board to wander through the community observing conditions and discussing them, but even under those circumstances, if homeowners are attracted and observe, they should not be excluded from such observation. It may be valuable for the new Board to invite homeowners to join the next inspection as one means of having an exchange of views among the Board and the homeowners on their expectations for community architecture.

It also may be valuable for the Board elected at the next annual meeting to take a survey or hold an open forum meeting to discuss architectural issues including the process for approval. It is not uncommon for architectural design in a community to change over time even when applications for architectural change are handled with great care. To some extent this is a result of differing viewpoints within communities. A survey or open forum could provide an opportunity to understand the consensus in the community. The community documents in this Association do not guarantee that the design standards will not change; only that any change should be managed. If the majority of the unit owners are not concerned about or are opposed to keeping the original design unchanged, it will change. But the Board has an obligation to see that architectural design is given reasonable attention and is managed for the benefit of all members of the community.

There has been enough dissention in the community and reducing the number of positions on the Board immediately prior to an annual meeting seems likely to contribute to more disagreement. A Board of Directors, after the next annual meeting, may decide to recommend reduction of the size of the Board so long as such reduction is in accordance with Article IV, Section 1 of the Devonshire East Bylaws.

At the last annual meeting held in September 2006, proxies that did not include the names of the Board candidates were used in the election of members of the Board. It is unnecessary to change the result of that election as determined by the Board because there were actually three vacancies on the Board and only two candidates. Thus, both

Mr. Wiesel and Ms Mielach were elected. Ms Mielach's election has not been recognized to date, thus her three-year term, if she is still willing to serve, will begin on the date of this Decision.

Most community records such as treasurer's reports, financial statements, audits, contracts, meeting minutes, legal opinions regarding governance (except relating to litigation) should be available to every member of the Board and in most instances also to every member of the community. Many communities routinely circulate many such documents. But if not routinely circulated they should be provided upon request. The Board needs to consider how to accomplish the creation and maintenance of appropriate records and may wish to negotiate an agreement with the management company that will assist in improving taking and keeping necessary community records.

Board business needs to be conducted at meetings that are open to the members and for which notice of time, place and purpose is provided to the members. This is also true of the conduct of business by Board appointed committees. Minutes need to be taken, approved and kept. Consideration should be given to distributing the minutes of all Board meetings to all members of the Association.

It is always possible to have informal working sessions of a Board that permit the Board members to discuss issues in private and then to hold a Board meeting and take a vote on those issues in open session. This deprives community members of insight into the considerations and reasons for Board decisions and contributes to disagreements and dissension. It is an approach that is contorted and counterproductive.

It would be a good idea for those considering running for positions on the Board of Directors to read the Devonshire East Declaration and Bylaws again before deciding to run.

Lastly, in 2006 some members of the Board passed a resolution censuring one member of the Board. For the most part the censure related to sharing documents and information related to Association business that was appropriately shared with members of the community. The censure resolution is inexcusable. It is without significance to the business of the community. It is, however, emblematic of the lack of respect Board members have shown to each other and by extension to the community.

Conclusions of Law

1. There are seven positions on the Board of Directors of Devonshire East Homeowners Association.
2. Frances Mielach was elected as a Director at the September 28, 2006 meeting.
3. The direction provided in the Association bylaws at Article III, Section 1, "Annual Meetings" requires the Board of Directors to pick and establish a date or a day

(e.g., the third Thursday in May) as the regularly scheduled date for the Annual Meeting; not to pick a different date each year.

4. The better interpretation of Section 10B-17 of the Montgomery County Code is that a proxy to vote in the election of Directors will have the names of the candidates and be voted by the unit owner, but may be carried to the meeting by another unit owner.

5. The ratification resolution passed on May 18, 2006 is without legal effect since it was entirely unspecific. Such a resolution may only effectively ratify one or more discrete described act(s).

6. The better reading of the bylaw language at Article V, Section 1, regarding composition of the nominating committee is that it will be chaired by a member of the Board and include two or more members of the community who are not members of the Board, in order to reduce the potential for self-perpetuation of incumbent Board members.

7. The Board has over several years frequently violated requirements of the Maryland Homeowners Association Act and the Devonshire East Bylaws by failing to provide notice of Board meetings and Board Committee meetings and/or doing business in meetings that were closed or informally in meetings for which no notice was provided. Board meetings and meetings of committees established by the Board must be open in accordance with the Maryland Homeowners Association Act and the Association Bylaws. This includes providing reasonable notice with an agenda to all unit owners. Any inspection of the property by the Board is an open meeting as there is no expectation that there would be a need to discuss any matter that would compromise any unit owner's privacy or reputation in matters not related to the homeowners association's business, or may be a work session for which notice is not given to the community but from which members of the community cannot be excluded.

8. Community records were not available to members of the community or to members of the Board as they are required to be by statute and the Association Bylaws.

ORDER

1. The Board of Directors shall hold an annual meeting of the members of Devonshire East Homeowners Association before the end of June or in September after Labor Day in 2008. The Board shall accept nominations, and to the extent there are sufficient candidates, fill positions to bring the total number of members on the Board to seven.

2. Frances Mielach's three-year term on the Board of Directors begins upon issuance of this Decision and Order.

3. The nominating committee, chaired by a member of the Board, shall include at least two members of the community who are not presently on the Board. From this annual meeting until the next annual meeting, no person serving on this nominating committee may be elected or appointed to the Board. This does not affect an incumbent member of the Board whose term does not expire prior to the next annual meeting. After this annual meeting the Board may choose to adopt this rule for the future or choose not to do so.

4. After the annual meeting, the Board shall designate a day or date which will be the date of the regularly scheduled annual meeting. This date shall be announced to the community and may only be changed when another regularly scheduled date is selected by a future Board.

5. Proxies used to vote for members of the Board of Directors shall be ballots with the names of all candidates listed and space for write-in candidates for those nominated at the annual meeting.

6. The Board may not enter into a contract with a management company for longer than a one-year period; but such contracts may be renewable by mutual agreement. The management contract must include terms for the retention and management of the records of the community for periods appropriate to the nature of the records. The books and records of the community shall be available to any member during commonly accepted business hours at a minimum.

7. Board meetings and meetings of committees established by the Board shall be open in accordance with the Maryland Homeowners Association Act and the Association Bylaws. The Board or Board committee shall deliver to all unit owners reasonable notice of the time and place for each meeting with an agenda. Any inspection of the Devonshire East property by the Board shall be either an open meeting with notice or may be a work session without notice to the community from which homeowners may not be excluded.

8. The Board shall assure that minutes of meetings of the Board and Board committees memorializing the business conducted be prepared, be maintained in the records of the community and be made available to all members either routinely or upon request.

9. In accordance with Montgomery County Code § 10B-13 (d) and Section 11.02 of the Devonshire East Declaration, which provides for payment of the costs of an action, including legal fees, to enforce the provisions of the community's documents, payment by the Association of Ms Fiscina's costs and reasonable legal fees for this action are hereby awarded. By pursuing this case, she has successfully enforced, among others, provisions regarding the scheduling of the annual meeting of the Association, correction of the number of positions on the Board of Directors, correction of the form of proxy for election of Directors, requirements that notice of meetings of the Board and its Committees be provided to all members and that the meetings be open to their attendance, and the requirement that records be available to members of the Association.

Complainant's counsel will submit a complete statement of those costs and fees for review by the Panel.

10. The Board shall distribute this Decision and Order to every unit owner in the Devonshire East Homeowners Association within ten (10) days from the date of its issuance.

The foregoing is concurred in by Commissioners Staci Gelfound and Vicki Satern Vergagni.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days from the date of this Order, under the Maryland Rules of Procedure.

Dinah Stevens, Panel Chairwoman
Commission on Common Ownership Communities

[Staff note: Devonshire East appealed the part of this decision concerning the award of attorney fees (but not the rest of the decision) to the Montgomery County Circuit Court. In an unwritten decision, the Circuit Court Judge ruled in Devonshire's favor and *reversed* the award of attorney fees. The Judge said that he did not believe the language of the Declaration made the association liable for attorney fees.]